

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

JOSEPH PAUL GUARNERI,

Plaintiff,

**9:05-CV-444
(GLS/DRH)**

v.

JOHN BATES, JR., *Sheriff of Schoharie County*; **LT. HAZZARD**, *Superintendent of Schoharie County Jail*; **MR. SANTORO**, *First Sergeant of Schoharie County Jail*; **MR. NEWMAN**, *Sergeant of Schoharie County Jail*; **ROLAND HIRST**, *Deputy of Schoharie County Jail*; **MR. GORDON**, *Deputy of Schoharie County Jail*; **PAUL MARSH, JR.**, *Deputy of Schoharie County Jail*; **SCHOHARIE COUNTY JAIL MEDICAL DEPARTMENT**; **DR. WEITZ**, *Physician for Schoharie County Jail*,

Defendants.

APPEARANCES:

OF COUNSEL:

FOR THE PLAINTIFF:

JOSEPH PAUL GUARNERI
Pro Se
05-B-0213
Elmira Correctional Facility
P.O. Box 500

Elmira, New York 14902

FOR THE DEFENDANTS:

GIRVIN, FERLAZZO LAW FIRM
20 Corporate Woods Boulevard
2nd Floor
Albany, New York 12211-2350

GREGG T. JOHNSON, ESQ.
JACINDA HALL CONBOY, ESQ.

Gary L. Sharpe
U.S. District Judge

MEMORANDUM-DECISION AND ORDER

I. Introduction

Plaintiff *pro se* ("Guarneri") brings this action pursuant to 42 U.S.C. § 1983. He alleges that the defendants violated his constitutional rights under the Eighth Amendment through deliberate indifference to his serious medical needs. (See Compl. ¶ 1, Dkt. No. 1.) The defendants filed a motion for summary judgment seeking dismissal of Guarneri's action which was referred to Magistrate Judge David R. Homer for report and recommendation.¹ See 28 U.S.C. § 636(b)(1)(A), (B); N.D.N.Y. R. 723(c); Gen. Order No. 12, § D(1)(G). Judge Homer recommended that the motion be granted and the action be dismissed. (See Dkt. No. 86.)

¹ The Clerk is directed to append Judge Homer's Report-Recommendation to this decision, and familiarity is presumed.

Guarneri has now filed timely objections. (See Dkt. No. 87.)

II. Standard of Review

A party's objection to the findings and recommendations of the Magistrate Judge must be filed within 10 days of receiving the Magistrate's recommendation and order. See *id.* at *2-6. Objections must be written and specific, which is to say they must "specify the findings and recommendations to which [the party] object[s], and the basis for their objections." *Id.*

Those recommendations and findings as to which the party has made timely, specific objection must be reviewed *de novo*. *Id.* However, those as to which the party has not made timely and/or specific objection are not entitled to any review, although the court may, in its discretion, elect to conduct a review nonetheless. *Id.* While the court may conduct a discretionary review pursuant to any standard it sees fit, this court has consistently applied a "clearly erroneous" standard. *Id.* Under this standard a recommendation or finding will be overturned only if "the court determines that there is a mistake of fact or law which is obvious and affects substantial rights." *Id.*

Objections based on arguments not raised as a matter of first

impression before the Magistrate Judge are also not entitled to any review. See *id.* In such a situation the court may again elect to conduct a discretionary review, this time using a *de novo* standard as a matter of necessity, since the Magistrate has not had an opportunity to pass on the argument. See *id.*

III. Discussion

To establish a claim for denial of medical care in violation of the Eighth Amendment a plaintiff must establish deliberate indifference to a serious medical need. See *Wilson v. Seiter*, 502 U.S. 294, 297 (1991). While conceding that Guarneri's shoulder injury was serious, Judge Homer found that his knee injury was not. In addition, Judge Homer found that the defendants herein were not deliberately indifferent to either injury.

Guarneri's only cognizable objection is that he has established that both his knee and shoulder injuries were sufficiently serious under the Eighth Amendment. However, Guarneri has not objected to Judge Homer's recommendation insofar as it found an absence of deliberate indifference to Guarneri's medical conditions. Perceiving no clear error in this finding the Court adopts it.

Since Guarneri has failed to adduce evidence of deliberate

indifference by the defendants herein, the Court dismisses his action.

IV. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Judge Homer's January 10, 2008 Report-Recommendation (Dkt. No. 86.) is accepted and adopted in its entirety; and it is further

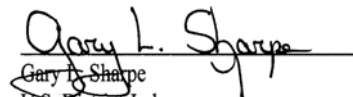
ORDERED that Guarneri's complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court enter judgment in favor of the defendants and close this case; and it is further

ORDERED that the Clerk of Court provide copies of this Order to the parties.

IT IS SO ORDERED.

March 10, 2008
Albany, New York



Gary L. Sharpe
U.S. District Judge